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10 Attorneys for Plaintiff and Counterdefendant,  
11 Netflix, Inc.

12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA

14 NETFLIX, INC., a Delaware corporation,

15 Plaintiff,

16 vs.

17 BLOCKBUSTER INC., a Delaware  
18 corporation, DOES 1-50,

19 Defendants.

20 AND RELATED COUNTER ACTION.

CASE NO. C 06 2361 WHA

[Assigned for Discovery Purposes  
to the Honorable Joseph C. Spero,  
United States Magistrate Judge]

**[PROPOSED] PROTECTIVE  
ORDER**

Complaint Filed: April 4, 2006

1           The Court having received the parties' Joint Stipulation Re Protective  
2 Order, having heard argument regarding the contested issues on October 4, 2006,  
3 and good cause appearing therefor, IT IS HEREBY ORDERED AS FOLLOWS:

4           1.     This Protective Order shall remain in full force and effect unless  
5 modified by an order of the Court or by a written stipulation of the parties filed with  
6 the Court. Without limiting the generality of the foregoing, this Protective Order  
7 shall survive and remain in full force and effect after the termination of this  
8 litigation, subject to further order of the Court.

9           2.     Nothing in this Protective Order shall limit or preclude any party  
10 from applying to the Court for relief from this Protective Order, or for such further  
11 and additional protective orders as the Court may deem appropriate. Further,  
12 nothing in this Protective Order shall preclude or limit a party's use of its own  
13 documents, or preclude or limit a party's use of documents obtained independently.

14           3.     Any party to this litigation or any third party who submits to the  
15 jurisdiction of this Court for the purpose of interpretation and enforcement of this  
16 Protective Order ("Producing Third Party"), who, in discovery or otherwise,  
17 produces or discloses any item, including without limitation any document, thing,  
18 interrogatory answer, deposition testimony, information or admission  
19 ("Material")(collectively, "Designating Party"), may designate the same as:

20           a.     "CONFIDENTIAL" where such Material contains competitively  
21 sensitive information or other confidential information the present disclosure of  
22 which would, in the good-faith judgment of the Designating Party, be unfairly  
23 detrimental to the Designating Party in the conduct of its business; or

24           b.     "CONFIDENTIAL – ATTORNEYS' EYES ONLY" ("AEO")  
25 where such Material meets the requirements of items designated as  
26 "CONFIDENTIAL" and, in addition, the disclosure of the Material or information  
27 contained in it to the other party poses an unfair and unreasonable risk of material  
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1 harm to the Designating Party (or in the case of a Producing Third Party  
2 Designating Party, if disclosure of the Material or information contained in it to  
3 either or both parties poses an unfair and unreasonable risk of material harm to the  
4 Designating Party).

5 4. CONFIDENTIAL and AEO Materials (collectively,  
6 "Confidential Material") shall be designated and marked in the following manners:

7 a. Documents: The Designating Party may designate documents  
8 as CONFIDENTIAL OR AEO by producing or serving copies of the document  
9 marked with a legend reading "CONFIDENTIAL" or "CONFIDENTIAL –  
10 ATTORNEYS' EYES ONLY." Such legend need only be placed on the first page  
11 of each document so designated.

12 b. Magnetic Media: Where material is produced in a magnetic  
13 medium (such as floppy diskette or tape), the diskette, tape, or other medium  
14 container shall be marked as set forth above.

15 c. Physical Exhibits: Physical exhibits shall be marked by placing  
16 a label on the exhibit marked as set forth above

17 d. Deposition Testimony: Testimony taken at a deposition may be  
18 designated as CONFIDENTIAL or AEO by counsel for any party (or any witness  
19 or counsel for such a witness) who makes a statement to that effect on the record at  
20 the deposition, or, alternatively, by notifying all parties to the action in writing that  
21 specific testimony, identified by page and line numbers, is CONFIDENTIAL OR  
22 AEO, within ten (10) working days of counsel's receipt of the deposition transcript.  
23 Deposition testimony and transcripts shall be treated as CONFIDENTIAL in their  
24 entirety until receipt of written notice as provided above or the expiration of the ten  
25 working day period for giving such notice, whichever is earlier.

26 5. Any Materials produced in discovery by a person or entity not a  
27 party to this action may be designated as CONFIDENTIAL OR AEO by a party to  
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1 this action, or by the producing third-party, by marking it in accordance with  
2 Paragraph 4 the time of production.

3 6. Confidential Material may be used only for the purposes of this  
4 litigation, and for no other purpose, and be disclosed or made available only to the  
5 Court, to counsel for a party (including the paralegal, clerical, and secretarial staff  
6 employed by such counsel), and to the following persons ("Qualified Persons"):

7 a. Parties and officers, directors, partners or employees of a party,  
8 and affiliates of a party deemed necessary by counsel to aid in the prosecution,  
9 defense, or settlement of this action;

10 b. Experts and consultants (together with their clerical staff)  
11 retained by counsel to assist in the prosecution, defense, or settlement of this action;

12 c. Court reporters employed in this action;

13 d. Witnesses at any deposition or other proceeding in this action;

14 e. As to any specific item of Confidential Material, the author of  
15 that item and anyone identified in the item as having received it in the ordinary  
16 course of business; and

17 f. Any other person as to whom all of the parties agree in writing.

18 However, prior to disclosing any Confidential Material to any  
19 "Qualified Person" described in sub-paragraphs (b) and (d) (but not including sub-  
20 paragraph (e)), the party wishing to so disclose Confidential Material shall provide  
21 such Qualified Person with a copy of this Order, and such Qualified Person shall  
22 complete and sign an Undertaking Pursuant to Protective Order in the form of  
23 Attachment "A" and the party wishing to so disclose Confidential Material shall  
24 provide a copy of the completed and signed Undertaking to counsel for the  
25 Designating Party as well as counsel for each party in this action. The original  
26 Undertaking shall be maintained by counsel for the disclosing party.

27 7. Materials or information designated by any party as  
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1 "CONFIDENTIAL – ATTORNEYS' EYES ONLY" shall be restricted to the  
2 following persons on behalf of the receiving party:

3 a. Alschuler Grossman Stein & Kahan, LLP and Keker & Van  
4 Nest, LLP, their employees, and any independent photocopying, duplication, or  
5 litigation support service hired for the purpose of aiding in this litigation;

6 b. Court personnel and stenographic reporters, engaged in such  
7 proceedings as are necessarily incident to the preparation for trial (e.g., depositions)  
8 and/or trial of this action;

9 c. Outside experts who are reasonably necessary to assist counsel  
10 for any party in the preparation for trial and/or trial of this action as well as the  
11 experts' employees and staff;

12 d. As to any specific item of AEO Material, the author of that item  
13 and anyone identified in the item as having received it in the ordinary course of  
14 business; and

15 e. Any other person as to whom all of the parties in writing agree.

16 However, prior to sharing any AEO Material with any "Qualified  
17 Person" described in sub-paragraph (c), the party wishing to disclose AEO Material  
18 to such person must provide ten (10) working days' written notice to the attorneys  
19 for the other side and for the Designating Party of the intent to disclose AEO  
20 Material to such person. Such notice shall include a copy of such person's  
21 *curriculum vitae* and shall include information sufficient to determine such person's  
22 qualifications, current and prior business affiliations, and any current or prior work  
23 performed for actual or potential competitors of the Designating Party whose AEO  
24 Material is sought to be disclosed so as to permit that party to determine whether  
25 grounds exist for objecting to such disclosure. If no objection is received within ten  
26 (10) working days, the party wishing to disclose AEO Material may do so, provided  
27 that the person to whom the disclosure is made is provided with a copy of this  
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1 Order and completes and signs an Undertaking in the form of Attachment "A" and  
2 a copy of the completed and signed Undertaking is provided to counsel for the  
3 Designating Party as well as counsel for each party in this action. The original  
4 Undertaking shall be maintained by counsel for the disclosing party.

5 If an objection is received within ten (10) days, then no disclosure may  
6 be made until the objection is resolved by Order of the Court or written agreement  
7 of the Designating Party.

8 In-house counsel for the parties shall not have access to materials  
9 designated as "CONFIDENTIAL - ATTORNEYS' EYES ONLY" absent further  
10 order of this Court or written agreement of the parties.

11 8. Any firm that receives materials designated as  
12 "CONFIDENTIAL - ATTORNEYS' EYES ONLY" under this protective order  
13 agrees that it shall not perform patent prosecution work for its client in this case  
14 until two years following final disposition of the case, including any appeals.  
15 However, such "patent prosecution work" shall not include:

- 16 a. Representation of the firm's client in determining whether to  
17 initiate any contested proceedings in the United States Patent  
18 and Trademark Office regarding one or both of the patents-in-  
19 suit in this case, or in anticipating possible initiation of such a  
20 proceeding, or in initiating, opposing, prosecuting, or defending  
21 against any such proceeding; and  
22 b. Providing copies or lists of prior art materials to the firm's client  
23 or to counsel who perform patent prosecution for the firm's  
24 client.

25 9. Any objections to the designation of any items of information as  
26 "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS' EYES ONLY" shall  
27 be made in writing to counsel for the Designating Party. Such objections may  
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1 include a request that the Designating Party approve redacted copies of specifically  
 2 identified documents with information designated as "CONFIDENTIAL -  
 3 ATTORNEYS' EYES ONLY" and/or "CONFIDENTIAL" redacted, and the  
 4 redacted copies redesignated with the appropriate confidential status. If such  
 5 objections cannot be resolved by agreement, either party may move the Court upon  
 6 notice to determine the propriety of the designation. The information which is the  
 7 subject of such a motion shall be treated in accordance with its specific designated  
 8 confidential status pending resolution of the motion, including appeals and writs.  
 9 As to Confidential Material produced and so designated by June 1, 2007, such  
 10 motions may be filed at any time up to and including August 20, 2007. As to  
 11 Confidential Material produced or designated after June 1, 2007, such motions may  
 12 be filed at any reasonable time.

13 10. Any documents or other information designated as  
 14 "CONFIDENTIAL" or "CONFIDENTIAL - ATTORNEYS' EYES ONLY" which  
 15 are filed with the Court for any purpose shall be filed in a sealed envelope and  
 16 marked with the title of the action and a statement substantially in either of the  
 17 following forms, as appropriate:

18 "CONFIDENTIAL. THIS ENVELOPE CONTAINING PAPERS  
 19 FILED BY (NAME OF PARTY) IN THIS CASE PURSUANT TO A  
 20 PROTECTIVE ORDER OF THE COURT IS NOT TO BE OPENED NOR THE  
 21 CONTENTS THEREOF DISPLAYED OR REVEALED EXCEPT BY COURT  
 22 ORDER OR BY AGREEMENT OF THE PARTIES."

23 or

24 "CONFIDENTIAL - ATTORNEYS' EYES ONLY. THIS  
 25 ENVELOPE CONTAINING PAPERS FILED BY (NAME OF PARTY) IN THIS  
 26 CASE PURSUANT TO A PROTECTIVE ORDER OF THE COURT IS NOT TO  
 27 BE OPENED NOR THE CONTENTS THEREOF DISPLAYED OR REVEALED  
 28

1 EXCEPT BY COURT ORDER OR BY AGREEMENT OF THE PARTIES.”

2 To the extent practicable, CONFIDENTIAL and AEO Material shall  
3 be filed separately or in several portions of filed papers, so that the non-confidential  
4 portions may be disseminated freely. No Confidential Material shall be included in  
5 whole or in part in pleadings, motions, briefs, or other papers filed in the Court  
6 except as provided for in this paragraph. *Parties to comply with local rule 79-5. JES*

7 11. Failure to designate Confidential Materials in accordance with  
8 this Protective Order or the failure to object to a designation at or within the given  
9 time shall not preclude the filing of a motion at a later date seeking to impose such  
10 designation or challenging the propriety thereof. This Protective Order shall not be  
11 construed as a waiver of any right to object to the furnishing of information in  
12 response to discovery.

13 12. In the event that any material designated “CONFIDENTIAL” or  
14 “CONFIDENTIAL - ATTORNEYS’ EYES ONLY” is used in any court  
15 proceedings in connection with this litigation, it shall not lose its  
16 “CONFIDENTIAL” or “CONFIDENTIAL - ATTORNEYS’ EYES ONLY” status  
17 through such use, and the parties shall take all steps reasonably required to protect  
18 its confidentiality during such use.

19 13. The parties agree that acceptance of any documents or other  
20 materials designated as “CONFIDENTIAL” or “CONFIDENTIAL -  
21 ATTORNEYS’ EYES ONLY” pursuant to this Order shall not constitute an  
22 admission or acknowledgement by the receiving party that documents or materials  
23 so designated are in fact proprietary, confidential, trade secret, and shall not  
24 constitute an admission by any party that such documents or information would be  
25 admissible evidence at trial.

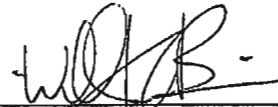
26 14. Promptly, and no later than thirty (30) days after final  
27 termination of this action by judgment, settlement, or otherwise, all Confidential  
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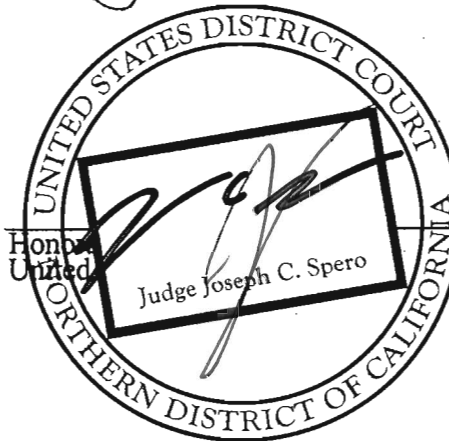
1 Material furnished or produced under the terms of this Protective Order, including  
 2 all copies thereof and all documents incorporating such information, except all  
 3 pleadings filed with the Court, exhibits marked in discovery or at trial and materials  
 4 which in the judgment of the attorney in possession of the materials are work  
 5 product materials, shall be delivered to the counsel for the Designating Party or  
 6 shall be destroyed and written certification of such destruction provided to counsel  
 7 for the Designating Party, unless the Designating Party agrees otherwise in writing.  
 8 The above-described pleadings, exhibits, and work product materials, may be  
 9 retained in confidence under the terms of this Protective Order by outside counsel  
 10 for each party.

11 15. Upon approval by the Court, this Protective Order shall govern  
 12 further discovery in this case.

13  
 14  
 15 APPROVED AS TO FORM:

16   
 17 William J. O'Brien  
 18 Counsel for Blockbuster Inc.

19  
 20  
 21 DATED: October 23, 2006



**ATTACHMENT "A"**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

NETFLIX, INC.,

Plaintiff,

vs.

BLOCKBUSTER INC.,

Defendant.

CASE NO. C 06-2361 WHA

[Assigned for Discovery Purposes to the  
Honorable Joseph C. Spero, United  
States Magistrate Judge]**UNDERTAKING PURSUANT TO  
PROTECTIVE ORDER**

And related counterclaims.

The undersigned acknowledges receipt and review of this Protective Order previously entered into in this matter, understands the terms and conditions thereof, is among those "qualified" persons specified therein as entitled to review "CONFIDENTIAL" [and "CONFIDENTIAL ATTORNEYS' EYES ONLY"] Material as defined therein, and agrees to be bound by the terms of such Order. Upon the termination of this lawsuit, the undersigned also agrees to return or dispose of all such Confidential Material, including all copies or notes thereof, as provided in the Order.

DATED: \_\_\_\_\_

Type or Print Name: \_\_\_\_\_

Address: \_\_\_\_\_

Telephone Number: (\_\_\_\_) \_\_\_\_ - \_\_\_\_\_